

REMARKS

Status of claims

The Office Action of January 16, 2004 presents the examination of claims 107, 109-111 and 126-134. This paper amends claims 107, 109-110, 126, 128-130, 132 and 133 and adds new claims 135-149 for examination. Thus, claims 107, 109-111 and 126-149 are pending.

Interviews

A personal interview with the Examiner was held on March 25, 2004 as indicated on the Interview Summary of record. Applicants note that the Interview Summary correctly describes the substance of the interview.

A telephone interview with the Examiner was held on March 26, 2004, in which the acceptability of the language "consisting essentially of" and the appropriate language for the end clause of certain claims, e.g., claim 107, "wherein, when present in a *Lactobacillus* host cell, said promoter is inducible...", was discussed. It was agreed in that telephone interview that this clause merely describes one setting in which the promoter is functional, but this clause does not limit the scope of the claim to the presence of the DNA in a *Lactobacillus* host cell. That is, the claimed DNA has the recited function when present in a *Lactobacillus* host cell, and this provides a simple

functional test that can be used to determine the metes and bounds of the claim. However, the claimed DNA is functional in other host cells as well, at least those that express the products of K and R genes of a lactic acid bacterium, or functionally similar gene products, and so the claim is not limited to the presence of the DNA in a *Lactobacillus* host cell.

Objections to the claims

Claims 107, 109-11 and 126-134 were objected to for usage of "residues" in the claims. This term has been amended to "nucleotides" or "amino acids" as appropriate, as suggested by the Examiner, thus obviating this objection.

Rejections under 35 U.S.C. § 112, first and second paragraphs

Claim 107 is rejected under 35 U.S.C. § 112, first paragraph, for alleged failure of adequate written description of the invention in the specification. Claim 107 is also rejected under 35 U.S.C. § 112, second paragraph, as being indefinite in failing to distinguish over a naturally occurring sequence as no function is recited. Claims 107, 109-111 and 126-134 are rejected under 35 U.S.C. § 112, first paragraph, for alleged lack of enablement by the specification.

As discussed in the interview of March 25, 2004, the essence of the Examiner's position is that the function of the

claimed sequences is not stated in the claims. The amendments herein introduce the function of the recited structures. The Examiner has agreed that such amendments are sufficient to overcome the standing rejections under 35 U.S.C. § 112, first paragraph. Applicants accordingly request withdrawal of these standing rejections.

Rejection for lack of novelty

Claim 107 stands rejected under 35 U.S.C. § 102(b) as anticipated by Tichaczek or Diep. This rejection is respectfully traversed. Reconsideration and withdrawal thereof are requested.

The Examiner's position is that the sakacin P gene cluster described by Tichaczek and the plantaricin A gene cluster described by Diep also represent isolated nucleic acids as recited by claim 107. The Examiner's position is that the entire gene clusters as described in these papers include a nucleic acid having the structure described in claim 107.

As discussed in the interview of March 25, 2004, claim 107 is amended to further recite a structural element not present in the Tichaczek or Diep reference. Thus, the instant rejection is overcome and should be withdrawn.

The present application well-describes and claims patentable subject matter. The favorable action of allowance of the

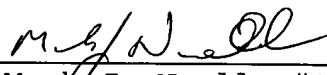
pending claims and passage of the application to issue is respectfully requested.

Should there be any outstanding matters that need to be resolved in the present application, the Examiner is respectfully requested to contact Mark J. Nuell (Reg. No. 36,623) at the telephone number of the undersigned below, to conduct an interview in an effort to expedite prosecution in connection with the present application.

If necessary, the Commissioner is hereby authorized in this, concurrent, and future replies, to charge payment or credit any overpayment to Deposit Account No. 02-2448 for any additional fees required under 37 C.F.R. §§ 1.16 or 1.17; particularly, extension of time fees.

Respectfully submitted,

BIRCH, STEWART, KOLASCH & BIRCH, LLP

By 
Mark J. Nuell, #36,623

DRN/mua
1380-0122P

P.O. Box 747
Falls Church, VA 22040-0747
(703) 205-8000